

# **EXHIBIT E**

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Page 1

1                   UNITED STATES DISTRICT COURT  
2                   NORTHERN DISTRICT OF CALIFORNIA  
3                   SAN FRANCISCO DIVISION  
4                   ORACLE AMERICA, INC.,  
5                   Plaintiff,  
6                   vs.    Case No. 3:10-cv-03561-WHA  
7                   GOOGLE, INC.,  
8                   Defendant.

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13 \*HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY\*

14                   PURSUANT TO THE PROTECTIVE ORDER  
15                   VIDEO DEPOSITION OF JAMES MALACKOWSKI  
16                   San Francisco, California  
17                   Wednesday, March 17, 2016  
18                   Volume I

19  
20  
21  
22 REPORTED BY:  
23 REBECCA L. ROMANO, RPR, CSR No. 12546  
24 JOB NO. 2265299  
25 PAGES 1 - 385

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1        UNITED STATES DISTRICT COURT 2        NORTHERN DISTRICT OF CALIFORNIA 3        SAN FRANCISCO DIVISION 4 ORACLE AMERICA, INC., 5 Plaintiff, 6        vs.        Case No. 3:10-cv-03561-WHA 7 GOOGLE, INC., 8 Defendant.  9 10 11 12 13        DEPOSITION OF JAMES MALACKOWSKI, 14 taken on behalf of the Defendant, at 15 633 Battery Street, San Francisco, California, 16 commencing at 8:35 a.m., Wednesday, 17 March 16, 2016, before Rebecca L. Romano, 18 Certified Shorthand Reporter No. 12546 19 20 21 22 23 24 25	Page 2	Page 4
		1        APPEARANCES OF COUNSEL (cont'd) 2 3 For the Defendant: 4        KEKER & VAN NEST LLP 5        BY: DANIEL PURCELL 6        BY: MAYA KARWANDE 7        Attorneys at Law 8        633 Battery Street 9        San Francisco, California 94111 10      (415) 773-6697 11      dpurcell@kvn.com 12      mkarwande@kvn.com 13 14 For James Kearn: 15        FARELLA BRUAN + MARTEL LLP 16        BY: JOHN L. COOPER 17        Attorney at Law 18        Russ Building 19        235 Montgomery Street 20        San Francisco, California 94104 21      (415) 954-4400 22      jcooper@fbm.com 23 24 25      ////
	Page 3	Page 5
1        APPEARANCES OF COUNSEL 2 3 For the Plaintiff: 4        ORRICK, HERRINGTON & SUTCLIFFE, LLP 5        BY: ANNETTE L. HURST 6        BY: ROBERT KEELE 7        Attorneys at Law 8        The Orrick Building 9        405 Howard Street 10      San Francisco, California 94105-2669 11      (415) 773-4585 12      ahurst@orrick.com 13      rkeele@orrick.com 14 and 15      BY: AYANNA LEWIS-GRUSS 16      Attorney at Law 17      51 West 52nd Street 18      New York, New York 10019-6142 19      (212) 506-5000 20      alewisgruss@orrick.com 21 22 23 24 25      ////	1        APPEARANCES (cont'd) 2 3 ALSO PRESENT: 4        James Kearn 5        Brandon Miller, Videographer 6        Deborah Miller, In-House Counsel Oracle 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25      ////	

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1	INDEX		
2	DEPONENT	EXAMINATION	
3	JAMES MALACKOWSKI	PAGE	
	VOLUME I		
4			
5	BY MR. PURCELL	10, 382	1 San Francisco, California; Wednesday, March 16, 2016
6	BY MR. COOPER	305	2 8:35 a.m.
7	BY MS. HURST	379	3 ---oo---
8			4 THE VIDEOGRAPHER: Good morning. We are
9			5 on the record at 8:35 a.m. on March 16th, 2016.
10			6 And this is the video-recorded deposition of
11	EXHIBITS (cont'd)		7 James Malackowski.
12	NUMBER	PAGE	
13	DESCRIPTION		8 My name is Brandon Miller, here with our
14	Exhibit 1576 Expert Report of James		9 court reporter, Rebecca Romano. We are here from
15	E. Malackowski, 1/8/2016;	51	10 Veritext Legal Solutions.
16			11 This deposition is being held at
17	Exhibit 1577 Responsive Expert Report		12 633 Battery Street, San Francisco, California.
18	of James E. Malackowski,		13 The caption of this case is
19	2/29/2016;	129	14 Oracle America, Inc., versus Google, Inc.,
20			15 Case No. CV 10-203561-WHA [sic].
21	Exhibit 1578 Strategic Forecast,		16 Please note that audio and video
22	OAGOOGLE0100164541,		17 recording will take place unless all parties agree
23	7 Pages;	262	18 to go off the record. Microphones are sensitive,
24			19 may pick up whispers, private conversations, and
25	////		20 cellular interference.
			21 I am not related to any party in this
			22 action, nor am I financially interested in the
			23 outcome in any way.
			24 At this time, will counsel please
			25 introduce themselves.
		Page 7	Page 9
1	EXHIBITS (cont'd)		
2	NUMBER	PAGE	
3	DESCRIPTION		1 MR. PURCELL: Dan Purcell,
4	Exhibit 1579 PowerPoint - Sun, Java in		2 Keker & Van Nest, representing Google.
5	Wireless Business Review,		3 MS. KARWANDE: Maya Karwande,
6	10/21/2008,		4 Keker & Van Nest, also representing Google.
7	OAGOOGLE0000142142 -		5 MS. MILLER: Deborah Miller, in-house at
8	OAGOOGLE0000142176.	267	6 Oracle.
9			7 MR. COOPER: John Cooper of
10			8 Farella Braun + Martel. I'm the -- I'm
11			9 representing Judge -- or I'm -- Jim Kearn, the
12			10 Judge's Rule 706 expert, Dr. Kearn. And he's
13			11 sitting beside me.
14			12 MS. HURST: Annette Hurst of,
15			13 Orrick Herrington & Sutcliffe for Oracle America, along
16			14 with my colleagues, Ayanna Lewis-Gruss and Robert Keele.
17			15 THE VIDEOGRAPHER: You may now swear in
18			16 the witness.
19			17 THE REPORTER: If you could raise your right
20			18 hand for me, please.
21			19 THE DEPONENT: (Complies.)
22			20 THE REPORTER: You do solemnly state,
23			21 under penalty of perjury, that the testimony you
24			22 are about to give in this deposition, shall be the
25	////		23 truth, the whole truth and nothing but the truth?
			24 THE DEPONENT: I do.
			25 ////

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<p style="text-align: right;">Page 106</p> <p>1 period in which they were acquired by Sun.      2 Q. What are the dates of that period?      3 A. I honestly don't recall from memory.      4 It's referenced within my rebuttal report. I don't      5 remember if it was 2009 or '10, and I don't want to      6 speculate.      7 Q. SavaJe was never able to achieve any      8 partnerships with any OEM handset manufacturers,      9 were they?      10 A. Well, ultimately, no. SavaJe was      11 acquired by Sun, and then ultimately shut down. It      12 was shut down subsequent to the launch of Android.      13 And in my opinion, it was shut down in part because      14 of the launch of Android.      15 Q. You say "in part because of the launch of      16 Android," were there other reasons why SavaJe was      17 shut down by Sun?      18 A. Not that I'm aware of.      19 Q. Sun didn't shut down SavaJe because it      20 wasn't able to make a -- a commercially viable      21 mobile phone product?      22 A. That's not true. I mean, my      23 understanding is, even prior to the acquisition by      24 Sun, SavaJe -- SavaJe had a working phone, that      25 they were named product of the year at the time,</p>	<p style="text-align: right;">Page 108</p> <p>1 point to showing that Sun shut SavaJe down because      2 of Android?      3 A. I believe there's explicit discussion of      4 that within my second report that includes      5 reference to discussions with OEM partners, where      6 OEM partners describe their opportunity with      7 Android as being more attractive. I would defer to      8 that report. I don't recall specific documents as      9 I sit here.      10 Q. Getting back to the mobile window, you --      11 you mentioned Nokia.      12 Nokia had never been able to develop a      13 commercially acceptable smartphone product, have      14 they?      15 A. Well, what's a smartphone? So there is a      16 continuum that exists between feature phones and      17 smartphones. At the end or the bookends of the      18 continuum, I think it's very clear that a feature      19 phone is different than a smartphone. But along      20 that continuum, I don't think it is fair to say      21 that Android -- I mean that Nokia never had a      22 product that could fairly be categorized as a      23 smartphone. I would have to go back to look at      24 their specific products and what they were      25 producing at the time. And even if it wasn't</p>
<p style="text-align: right;">Page 107</p> <p>1 that they had sold on the marketplace tens of      2 thousands of units through Tier 2 Telco companies.      3 So I don't think it's fair to say they didn't have      4 a working product.      5 Q. They were named product of the year by --      6 by who?      7 A. It was one of the shows that they      8 attended in the period right before -- right when      9 they launched. I don't recall the -- the trade      10 show.      11 Q. So Sun had a working -- strike that.      12 SavaJe had a working phone product that      13 was commercially viable, and yet Sun chose to shut      14 it down?      15 A. Yes. In response to the launch of      16 Android and, in particular, the competitive dynamic      17 that was created as a launch of the Android, I      18 think as summarized in my report, and -- and we're      19 talking about a very complex process in a very      20 short way, that Sun didn't feel that it could not      21 compete with its own technology wherein its own      22 technology was given away for free or even      23 subsidized through the traffic acquisition program      24 of Google.      25 Q. What contemporaneous records of Sun can</p>	<p style="text-align: right;">Page 109</p> <p>1 commercially launched, it is my understanding that      2 they clearly were using, I believe, Java SE at the      3 time in order to contemplate such.      4 Q. What's your basis for saying that Nokia      5 was using Java SE?      6 A. That's just my recollection in response      7 to your question. I -- I don't recall the specific      8 documents.      9 Q. Are you sure there are any?      10 A. Well, if -- if my recollection is right,      11 I didn't make it up, so I would believe there are,      12 yes.      13 Q. They would be cited in your report, I      14 would assume.      15 A. I don't know that to be the case. I      16 don't believe I discussed at great length whether      17 or not Nokia had a smartphone in part, because that      18 is only in relevant if you believed that there were      19 some sort of counterfactual world that needed to be      20 taken into account, which clearly there is not. So      21 I don't think it's particularly relevant to my      22 opinions.      23 Q. All right. So what would Google have had      24 to deliver to market within the mobile window we      25 described, from 2005 to 2010, in order to assure</p>

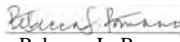
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<p style="text-align: right;">Page 110</p> <p>1 the success of Android?</p> <p>2 A. A Java-based phone, hopefully</p> <p>3 appropriately licensed.</p> <p>4 Q. It would have to be a Java-based system?</p> <p>5 A. In my opinion, in order to be successful</p> <p>6 in that window of opportunity, as confirmed by what</p> <p>7 they actually did, the actual events, the revealed</p> <p>8 preference, so to speak; and as confirmed by the</p> <p>9 substantial promotion of Java to the OEM community,</p> <p>10 as detailed in the last exhibit, or appendix of my</p> <p>11 second report; and as confirmed by the testimony in</p> <p>12 this record which cited, which all points to the</p> <p>13 fact that the OEMs required Java, yes, it is my</p> <p>14 opinion that there was not an alternative platform</p> <p>15 that would have allowed them to penetrate the</p> <p>16 window and reach commercial success.</p> <p>17 Q. Other than predictive Google documents</p> <p>18 before Android was released, what's your basis for</p> <p>19 saying that OEMs required Java?</p> <p>20 A. I believe there are -- there's deposition</p> <p>21 testimony confirming that that is, in fact, the</p> <p>22 case, and testimony confirming that that was part</p> <p>23 of the reason Google determined and took the action</p> <p>24 that they did, supported by the fact that that's</p> <p>25 what they were promoting to the OEMs.</p>	<p style="text-align: right;">Page 112</p> <p>1 know they desired them because they were willing to</p> <p>2 pay millions of dollars, I think I cited a Samsung</p> <p>3 example where they were paid \$44 million over a</p> <p>4 discrete period of time -- and then they quickly</p> <p>5 transitioned to Android because they would pay</p> <p>6 nothing.</p> <p>7 So to me, that speaks volumes, actions</p> <p>8 speak louder than words, that the OEMs demanded a</p> <p>9 Java-base platform.</p> <p>10 Q. Now, why does that suggest that OEMs</p> <p>11 demanded Java as opposed to being willing to use an</p> <p>12 open source C++ platform?</p> <p>13 A. Because they were willing to pay with</p> <p>14 significant dollars in order to obtain Java</p> <p>15 pre Android under appropriate licensing. So if it</p> <p>16 were true that they would be indifferent, and if it</p> <p>17 were true that Dr. Leonard's analysis of the cost</p> <p>18 of moving to C++ is accurate, why would they -- why</p> <p>19 would Samsung pay \$44 million to Java when they</p> <p>20 could just go get C++ for substantially nothing.</p> <p>21 Q. Well, because nobody had developed a</p> <p>22 C++ platform yet. I mean, you -- you can't say,</p> <p>23 can you, that that proves anything, that Samsung</p> <p>24 was willing to pay \$44 million to license Java when</p> <p>25 there was no open source C++ or Java alternative</p>
<p style="text-align: right;">Page 111</p> <p>1 Q. What evidence do you have that Google was</p> <p>2 actually right about their predictions that OEMs</p> <p>3 required Java?</p> <p>4 A. Well, I think the best evidence is that</p> <p>5 the Java-based Android platform exceeded everyone's</p> <p>6 expectations. If you look to expectations or</p> <p>7 benchmark of expectations is, for example, by the</p> <p>8 arms' length negotiated incentives that were in --</p> <p>9 in the Android acquisition documents negotiated by</p> <p>10 Andy Rubin, versus what actually happened once</p> <p>11 Android hit the market and reached escape velocity,</p> <p>12 I think the evidence all points to the fact that</p> <p>13 Google was right, that it was the right choice in</p> <p>14 order to penetrate the market and capture the</p> <p>15 window of opportunity.</p> <p>16 Q. Are you aware of any statement from an</p> <p>17 OEM confirming that OEMs required Java?</p> <p>18 A. I can't tell you that I recall statements</p> <p>19 that explicitly contain those words, but what I do</p> <p>20 cite in my report is, OEMs who were paying millions</p> <p>21 of dollars to access Java through appropriate</p> <p>22 licensing, who made the decision to depart from</p> <p>23 that, only to go to Android, which was also Java</p> <p>24 based, and the explanation being that they were</p> <p>25 getting the same benefits they desired -- and we</p>	<p style="text-align: right;">Page 113</p> <p>1 being offered by anyone, can you?</p> <p>2 A. At some point now we are talking about</p> <p>3 more of a technical discussion and, for example,</p> <p>4 whether Microsoft an alternative that was available</p> <p>5 to them, Microsoft's platform.</p> <p>6 All I can tell you is that, one, we're</p> <p>7 in, again, counterfactual discussions which are not</p> <p>8 applicable. So there isn't extensive discussions</p> <p>9 with this in my report because, I mean, I can't say</p> <p>10 over and over again, to me the standard for</p> <p>11 calculating damages of profit disgorgement in a</p> <p>12 copyright case do not permit this discussion of a</p> <p>13 counterfactual world.</p> <p>14 But being that said, I think these are</p> <p>15 largely technical discussions. And so if you force</p> <p>16 the discussion of the hypothetical, I would</p> <p>17 encourage you to ask those questions of the</p> <p>18 technical experts.</p> <p>19 Q. Are you offering an opinion on the legal</p> <p>20 standard for copyright infringement damages?</p> <p>21 A. So that's a little bit of a nuance</p> <p>22 question. So the analogy that I use, because I'm</p> <p>23 asked that frequently in a patent case, I refer to</p> <p>24 the Panduit factors and the Georgia-Pacific factors</p> <p>25 in virtually every case. That's a legal standard.</p>

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<p style="text-align: right;">Page 382</p> <p>1 take into account the unexpected events of the 2 marketplace, such as the development of the -- of 3 the consumer demand for smartphones, by way of 4 example, or, frankly, just the total overall demand 5 for smartphones at that time.</p> <p>6 MS. HURST: No further questions.</p> <p>7 FURTHER EXAMINATION</p> <p>8 BY MR. PURCELL:</p> <p>9 Q. Mr. Malackowski, really briefly, during 10 Mr. Cooper's questioning regarding Samsung phones 11 you referred to Java ME as an operating system.</p> <p>12 Do you remember that?</p> <p>13 A. I -- I do not remember that reference.</p> <p>14 Q. Java ME is not an operating system, 15 correct?</p> <p>16 A. I would not describe it as such.</p> <p>17 Q. It's an applications platform, correct?</p> <p>18 A. Better questions for the technical 19 expert. I don't believe I use either term in my 20 report. I don't have an opinion.</p> <p>21 Q. And, likewise, Java SE is not an 22 operating system either, correct?</p> <p>23 A. Same answer.</p> <p>24 MR. PURCELL: All right. That's all.</p> <p>25 MR. COOPER: Okay. Let's -- let's</p>	<p style="text-align: right;">Page 384</p> <p>1 I, JAMES MALACKOWSKI, do hereby declare under 2 penalty of perjury that I have read the foregoing 3 transcript; that I have made any corrections as appear 4 notes; that my testimony as contained herein, as 5 corrected, is true and correct.</p> <p>6 Executed this ____ day of _____, 7 2016, at _____.</p> <p>8 9 10 11 _____ JAMES MALACKOWSKI</p> <p>12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 383</p> <p>1 clarify that you, through counsel, are going to 2 send us, what, two items?</p> <p>3 MS. HURST: Yeah. Let's just -- do you 4 want to do it on or off the record?</p> <p>5 MR. COOPER: I don't care.</p> <p>6 MS. HURST: Let's go off the record and 7 then we'll confirm what it is that we're sending 8 you.</p> <p>9 THE VIDEOGRAPHER: This concludes today's 10 deposition of James Malackowski. The total number 11 of media used is seven. We're going off the record 12 at 6:31 p.m.</p> <p>13 (TIME NOTED: 6:31 p.m.)</p> <p>14 15 16 17 18       ---00o---</p> <p>19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 385</p> <p>1 I, Rebecca L. Romano, a Certified Shorthand 2 Reporter of the State of California, do hereby certify: 3 That the foregoing proceedings were taken before me 4 at the time and place herein set forth; that any 5 witnesses in the foregoing proceedings, prior to 6 testifying, were administered an oath; that a record of 7 the proceedings was made by me using machine shorthand 8 which was thereafter transcribed under my direction; 9 that the foregoing transcript is true record of the 10 testimony given.</p> <p>11 Further, that if the foregoing pertains to the 12 original transcript of a deposition in a Federal Case, 13 before completion of the proceedings, review of the 14 transcript [ ] was [X] was not requested.</p> <p>15 I further certify I am neither financially 16 interested in the action nor a relative or employee of 17 any attorney or any party to this action.</p> <p>18 IN WITNESS WHEREOF, I have this date subscribed my 19 name.</p> <p>20 21 Dated: March 17, 2016</p> <p>22 23 24        Rebecca L. Romano, RPR, CSR. No 12546</p> <p>25</p>

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